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Issue Date: 05 November 2003

Case No.: 2003-LHC 0574, 2003-LHC 0575

OWCP No.: 05-74578

In the Matter of:

JAMES E. BRUMSKIN, JR.,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

Appearances:

Gregory E. Camden, Esq.,
For Claimant

Benjamin M. Mason, Esq.,
For Employer

Before:
FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by James E. Brumskin, Jr. ("Claimant") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 USC 901, et seq. Claimant seeks permanent total disability benefits as a result of a work-related injury to his left knee which occurred on February 15, 1990, and a right knee injury that allegedly is a consequence of the left knee injury. Newport News Shipbuilding and Dry Dock Company ("Employer" or "the shipyard") argues that permanent total disability benefits are inappropriate because alternative employment opportunities are available to Claimant outside the shipyard.

A formal hearing in this case was held on May 6, 2003 in Newport News, Virginia. All parties were afforded a full and fair opportunity to present evidence and argument as provided for by statute and regulation. The parties submitted stipulations,

which were admitted as joint exhibit 1 (JX 1).¹ Claimant offered exhibits CX 1 through CX 25, and Employer offered exhibits EX 1 through EX 5. Without objection all were admitted into evidence. The record was held open for ninety days to allow the parties the opportunity to conduct post-hearing depositions. After the hearing, Claimant offered the deposition testimony of William Hill in the case Joseph Daniels v. Newport News Shipbuilding & Dry Dock Co., 2000-LHC 2459, 1460, 2461 as Claimant's exhibit 26 (CX 26). Claimant also offered Mr. Hill's hearing testimony in Daniels as Claimant's exhibit 27 (CX 27). Claimant deposed Dr. James Phillips on July 1, 2003 and offered his deposition as Claimant's exhibit 28 (CX 28). Without objection, CX 26 - CX 28 are hereby admitted into evidence. On July 2, 2003, the parties agreed to additional stipulations. The additional stipulations were offered by Claimant on September 8, 2003 and are hereby admitted into evidence as JX 2. Although both parties were afforded the opportunity to submit post-hearing briefs, only Claimant submitted one.

The findings and conclusions that follow are based upon a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated, and I find that:

1. An employer / employee relationship existed between the shipyard and Claimant at all relevant times (JX 1);
2. The parties are covered by the act (JX 1);
3. Claimant suffered an injury to his left knee on February 15, 1990 (JX 1);
4. Claimant provided timely notice of injury (JX 1);
5. Claimant filed a timely claim for compensation (JX 1);
6. Employer filed a timely first report of injury and a timely notice of controversion (JX 1);

¹The following are citations to the record:

CX - Claimant's exhibit;
EX - Employer's exhibit;
JX - Joint exhibit; and
Tr. - Transcript of the hearing.

7. Claimant's average weekly wage at the time of injury was \$484.98, resulting in a compensation rate of \$323.32 (JX 1);
8. Employer paid to Claimant benefits as follows:

Type of Disability	Dates Paid	Amounts Paid	Weeks Paid	Total Paid
Temp. Total (TTD)	3/2/1990 - 3/21/1990	\$323.32 per week	2 weeks, 6 days	\$923.77
TTD	7/9/1994 - 1/20/1998	\$323.32 per week	184 weeks, 4 days	\$59,675.63
Temp. Partial (TPD)	1/21/1998 - 1/19/2000	\$291.00 per week	104 weeks, 1 day	\$30,305.57
TPD	1/20/2000 - 3/19/2000	\$282.79 per week	8 weeks, 4 days	\$2,423.91
TTD	3/20/2000 - 10/2/2002	\$323.32 per week	133 weeks	\$43,648.20
Perm. Partial (PPD)	50% rating left leg	\$323.32 per week		\$46,558.08

(JX 2);

9. If Claimant is entitled to benefits, then Employer is entitled to a credit for the following benefits already paid: temporary total disability benefits from 3/20/1990 through 3/21/1990 inclusive; from 7/9/1994 through 1/20/1998 inclusive, from 3/20/2000 to 10/24/2001 inclusive; and from 11/01/2001 through 10/20/2002 inclusive at the rate of \$323.32 per week, amounting to \$103,924.28; temporary partial disability from 1/21/1998 through 1/19/2000 inclusive at the rate of \$291.00 per week, amounting to \$30,305.57; temporary partial disability from 1/20/2000 through 3/19/2000 inclusive at a rate of \$282.79 per week, amounting to \$2,423.91; and permanent partial disability based on a 50% permanent partial impairment to Claimant's left leg in the amount of \$46,558.08 (JX 2);
10. Claimant's right-knee injury is a compensable consequence of the February 15, 1990 left-knee injury (JX 2);
11. Claimant was offered a job with James-York Security, LLC as an unarmed security guard beginning on May 9, 2003 at 1:30pm at a pay rate of \$5.57 per hour. No set number of hours per week were guaranteed in the job offer (JX 2);

12. Claimant turned down the job offer from James-York Security based on counsel's advice (JX 2);
13. The deposition testimony of William Hill of James-York Security, LLC given in the case Joseph Daniels v. Newport News Shipbuilding & Dry Dock Co., 2000-LHC-2459, 2460, 2461, on May 3, 2001 and the testimony of William Hill given at the hearing in Daniels are relevant to the unarmed security guard position offered by James-York Security, LLC to Claimant (JX 2); and
14. Due to his work-related injury, Claimant cannot return to his pre-injury employment at the shipyard (Tr. 91).

ISSUES

1. Is Claimant's disability temporary or permanent?
2. Is Claimant totally disabled?

SUMMARY OF EVIDENCE

Hearing testimony of James E. Brumskin, Jr.

Claimant began working for the shipyard in 1977 as an X18 linesman welder. His job involved putting up heat bars, grinding, and pulling lines, which required frequent heavy lifting (Tr. 25-6). Apparently, on February 15, 1990, Claimant suffered an injury to his left knee while working at the shipyard.² Claimant returned to work at the shipyard after his injury. He performed some light duty work for about six months and then returned to his regular pre-injury employment. In 1994 he was passed out of work. Claimant has had four operations on his left knee since he was passed out of work (Tr. 27). The knee was totally replaced in 1997 (Tr. 28). The left knee "pops and swells" and constantly gives out on him (Tr. 28, 31). To alleviate the pain Claimant tries to sit down and relax as frequently as possible (Tr. 28). He takes Tylenol with codeine (Tylenol III) and Celebrex to combat the pain (Tr. 28).

Claimant's right knee began to develop problems in 1998 (Tr. 29). The right knee scrapes and swells. Claimant is currently undergoing cortisone injection treatments for the right knee (Tr. 30). The cortisone treatments help, but the pain

²The record contains no description of the circumstances of the injury, though Employer apparently does not dispute that Claimant suffered a work-related injury to his left knee on February 15, 1990 (See JX 1 at paragraph 3; JX 2 at paragraph 10).

returns within two weeks after each injection (Tr. 30). Claimant intended to undergo surgery on his right knee two weeks after the hearing (Tr. 34).

Claimant has been certified as a security guard (Tr. 39). He worked for Hawk Security in October of 2001 for three nights before the pain in his knees caused him to quit the job (Tr. 31-2). Claimant was offered a security guard job with James York Security, a job that would require him to sit in a hotel in Williamsburg, Virginia and keep watch over school groups (Tr. 39).

Claimant briefly worked as a Goodwill Donations Center attendant but was taken off of the job due to his restrictions (Tr. 42).

Hearing testimony of Susan Crigler Castle

Susan Crigler Castle is a vocational case manager for Concentra Integrated Services in Richmond, Virginia (Tr. 42). She was asked by the shipyard to provide one-on-one job placement services to Claimant (Tr. 47). Castle determined that Claimant could perform the jobs of Goodwill Donation Center attendant, Wal-Mart greeter, and unarmed security guard (Tr. 47).

Castle testified that Claimant's limited education - he reads at the fourth-grade level, performs math at the fifth-grade level, and does not have a high-school diploma or G.E.D. certification - will negatively affect his opportunities for employment (Tr. 65-7).³ Many employers require that employees possess a high school diploma or G.E.D. (Tr. 67). Castle also testified that Claimant's residence in rural Smithfield, Virginia could limit his local employment opportunities (Tr. 69).

Castle and Claimant discussed a stocker position at the Ft. Eustis Commissary (Tr. 48). They met at the job site, Claimant interviewed for the position, and Dr. Phillips initially approved the job (Tr. 51). Castle testified that the job was approximately twenty to twenty-five miles from Claimant's home and that it could take up to 45 minutes for Claimant to make the trip from home to work (Tr. 73). Claimant was not offered the job at the commissary (Tr. 73).

Castle testified that Claimant volunteered to participate in the unarmed security guard certification program (Tr. 54). Claimant's description of the unarmed security guard position with James York Security was consistent with her understanding of the job duties (Tr. 55-8). The job is seasonal, with the season running from January or

³Vocational testing administered by Charles DeMark, an OWCP-certified vocational counselor, is consistent with Castle's testimony. DeMark's testing results showed that Claimant reads at a third grade level, spells at a fourth-grade level, and has fifth-grade level math skills (CX 1 at 8). DeMark opined that Claimant's history, lack of transferable skills, poor educational background, borderline intelligence, and competition from other workers render him noncompetitive in the labor market (Id. at 9).

February through August (Tr. 57). It is part time, and the number of hours assigned depends upon the reliability of the employee (Tr. 58). James York Security did not require a high-school diploma or G.E.D., although Castle explained that other security guard companies would require a diploma or G.E.D. (Tr. 67).

Testimony of William Hill

William Hill, the owner of James York Security, did not testify in this case. However, Claimant submitted his deposition (CX 26) and hearing testimony (CX 27) given in the case, Joseph Daniels v. Newport News Shipbuilding & Dry Dock Co. (Daniels), 2000-LHC 2459, 2460, 2461 as evidence concerning the unarmed security guard job at issue in this case (JX 2).

Mr. Hill's testimony in Daniels revealed that the unarmed security guards hired by James York Security rotate from site to site depending upon need (CX 26 at 5). The unarmed security guard job description is very general because the work conditions vary from site to site (Id. at 5-6). However, all guards must be able to respond to emergency situations (Id. at 9-10). Furthermore, all guards must be able to read and write, and all employees must be certified as unarmed security guards within 90 days of being hired (Id. at 9). Certification involves attending sixteen hours of school approved by the Virginia Department of Criminal Justice Services. At the end of the course, the applicants must pass a written open-book examination, which includes approximately 60 questions (Id. at 9-10).

There are no permanent, year-round or full-time positions for unarmed security guards with James York Security (CX 27 at 67). All of the positions are seasonal from February through August (Id.). The seasonal positions staffed by James York Security are available because school tours frequent the Jamestown-Yorktown-Williamsburg area (Id. at 60). There are occasions where James York Security employees will only work ten to twenty hours per month (Id. at 76).

Medical Opinion Evidence

Dr. James L. Phillips, Claimant's treating physician and a board-certified orthopaedic surgeon, testified that Claimant has mild-to-severe degenerative arthritis in his right knee (CX 28 at 4). The first evidence of Claimant's right-knee problem was documented in Dr. Phillips' office notes from November 2, 1998, in which he diagnosed Claimant's right-knee condition as "early degenerative joint disease" (CX 20 at 19). He opined that Claimant's condition had worsened over time despite orthroscopic surgeries.⁴ The current course of treatment for Claimant's right knee includes cortisone

⁴Dr. Phillips described Claimant's condition as "somewhere between mild and severe. . . a moderate amount of arthritis, which over the course of time. . . has progressed slightly" (CX 28 at 5).

injections and anti-inflammatory medications (CX 28 at 5). The injections are designed to alleviate the pain and restore Claimant's range of motion (Id. at 6). Dr. Phillips could see Claimant receiving the injections every year for the rest of his life (Id. at 4). Right knee replacement surgery could be needed in the future, but Claimant was not then ready for the procedure (Id. at 10).⁵

Dr. Phillips opined that Claimant's right-knee condition was never going to improve. In fact, despite repeated arthroscopies, Claimant's knee condition continues to deteriorate. However, Claimant could physically perform the unarmed security guard job in Williamsburg so long as he would be permitted to get up and move around as needed to relieve the pain in his knee (Id. at 14). However, he eventually concluded that the stocker position at the Ft. Eustis Commissary would not be appropriate because Claimant would have to meet production quotas and bend and stoop down (Id.).

Dr. Arthur Wardell also evaluated Claimant's knees. In an April 8, 2002 letter, Dr. Wardell diagnosed Claimant with post-traumatic arthritis of the left knee with progressive arthritis in the right knee (CX 24). With regard to the right knee he opined that Claimant "will need an arthroscopic debridement, possible osteotomy and more likely than not a total knee replacement in the future" (Id. at 3).

At Employer's behest, Dr. Sheldon Cohn evaluated Claimant. In a November 20, 2001 letter, Dr. Cohn opined that Claimant should be limited to sedentary work and that he should not walk for more than four hours per day (CX 15). Dr. Cohn explained that:

If [Claimant] is not to receive further treatment for his right knee, I believe that he has reached maximum medical improvement, but most likely this knee will progress with arthrosis to the point where he will require a total knee replacement. At some point in the future he most likely will undergo arthroscopic debridement and perhaps an osteotomy prior to that.

(Id. at 2). He also opined that, if no other intervention were planned for Claimant's knee, he would assign a 20 percent impairment rating to the right knee (Id.).

Dr. Michael Barnum examined Claimant for the Department of Labor, Office of Workers' Compensation Programs (CX 22). Dr. Barnum opined that the arthritic changes in Claimant's right knee were more likely than not accelerated because of the affects of the left-knee injury (Id. at 2).

⁵Dr. Phillips opined that surgery was not indicated by Claimant's current condition, but it is "certainly possible" that, if Claimant's knee continues to deteriorate, he might undergo "a unit compartment, that is, a one-sided knee replacement. . . or a total knee replacement" (CX 28 at 9-10). However, he emphasized that "[Claimant's] joints are not anywhere nearly affected enough to have that at this time" (Id. at 10). In fact, he did not give any indication of when in the future Claimant might undergo knee replacement surgery.

Dr. Glen Nichols reviewed Claimant's medical records and opined that Claimant's right knee problems were exacerbated by the left knee injury and subsequent surgeries (CX 23 at 4). The acceleration of the degenerative changes in the right knee was due to the "excessive weight shifting to his right knee after the multiple surgical procedures on his left knee, as well as the permanent disability he has on his left knee from that surgery" (Id. at 5). He reviewed Claimant's medical records and opined that signs of right-knee problems were first evident in a July 1994 X-ray (Id.). Dr. Nichols agreed with Dr. Cohn's assessment that Claimant "will require total knee replacement in the future on his right knee" (Id. at 5-6). Because the future surgery was indicated, Dr. Nichols stated, Claimant had not reached maximum medical improvement with regard to his right knee (Id. at 6). However, he expected Claimant's condition "to deteriorate over time and for him to have increasing pain in his right knee up until the time the surgery is completed" (Id.).

DISCUSSION

I. Is Claimant's disability temporary or permanent?

An injured worker's impairment may be found to have changed from temporary to permanent when the worker's condition has reached the point of maximum medical improvement ("MMI"). James v. Paint Stevedoring Co., 22 BRBS 271, 274 (1989). Maximum medical improvement can be established through direct medical testimony that a worker has reached MMI or by circumstantial evidence that the worker's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). The permanency of a disability is a medical determination, not an economic one. Mason v. Bender Welding Machine Co., 16 BRBS 307, 309 (1984).

If I find that Claimant's injury is permanent as opposed to temporary, he is confined to a scheduled award under Potomac Electric Power Co. v. Director, OWCP (PEPCO), 449 U.S. 268, 277 n.17 (1980), unless he can establish that he is totally disabled. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984). However, if I find that Claimant's injury is temporary, section 8(e) of the act applies but PEPCO does not. 33 USC 908(e).

The Benefits Review Board has held that, where no physician concludes that a worker's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. Kuhn v. Associated Press, 16 BRBS 46, 48 (1983). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. Worthington v. Newports News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986) (citing Meeke v. I.S.O. Personnel Support Dept., 10 BRBS 670, 675-76 (stating that "the determination that one has not yet sustained a permanent disability may not be based on a medical prognosis that claimant is likely at some indefinite future date to get better and may, based on

receiving “proper” treatment, then become stationary and rateable...” (emphasis in original)). If future surgery is not expected to improve the worker’s condition, then his disability may be found to be permanent. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233, 235 (1988). Likewise, a prognosis stating that the chances for improvement are remote is sufficient to support a finding that a claimant’s disability is permanent. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981).

The medical evidence of record supports the conclusion that Claimant has reached MMI. When asked whether he anticipated future surgery for the right knee, Dr. Phillips answered, “It’s certainly possible” (CX 28 at 10). He envisioned either a one-sided knee replacement or a total knee replacement. However, he opined that Claimant was not yet ready for surgery. According to Dr. Phillips, Claimant’s “joints are [not] nearly affected enough to have [surgery] at this time” (Id.). He also opined that the surgery could relieve Claimant’s knee pain and improve his range of motion (Id.). He made clear, though, his opinion that the right knee was deteriorating and would not get any better prior to any replacement surgery (Id. at 11). He opined that:

[A]t this point it should be obvious to everyone that his right knee is not getting any better, that its getting slower. It’s not bad enough to require an operation, but it’s too involved to hope that periodic arthroscopies are going to help. He’s been arthroscoped and continues to get worse in spite of that.

(Id. at 12). In his post-hearing deposition, Dr. Phillips testified that, by March 23, 2003, the last time he had examined Claimant, it was “obvious” that Claimant’s right knee was not going to improve (Id. at 13). He did not give an opinion as to when in the future Claimant might undergo knee replacement surgery.

Dr. Arthur Wardell evaluated Claimant’s right knee and diagnosed his condition as progressive arthritis (CX 24). Dr. Wardell opined, as did Dr. Phillips, that the right-knee condition likely would lead to a total knee replacement some time in the future (Id. at 3). He, too, did not give an opinion as to when in the future the right knee surgery would be necessary. Likewise, Dr. Sheldon Cohn concluded that Claimant’s right knee would require surgery and eventually a total knee replacement, though he did not explain how soon the surgery might be required (CX 15). Dr. Glenn Nichols reviewed Claimant’s medical records and opined that future surgery would be necessary (CX 23 at 5-6). Thus, in his opinion, Claimant’s right-knee condition had not yet reached MMI (Id.). However, Dr. Nichols did not opine as to when in the future Claimant’s right knee would need surgery.

All of the medical experts agree that Claimant will in all probability need to undergo knee replacement surgery at some time in the future. However, none of the doctors estimated when in the future the surgery would be needed. Furthermore, the doctors were certain that Claimant’s condition will continue to deteriorate until he undergoes knee replacement surgery. Although the expectation of future surgery can be evidence that MMI has not been reached, Kuhn, supra, even the probability of future

surgery that may or may not improve Claimant's condition does not preclude a finding that Claimant's condition is permanent. Worthington, supra; Phillips, supra. His right-knee condition is a lasting injury, and his condition continues to deteriorate. The doctors do not expect any improvement in the knee unless and until the as-yet unnecessary knee replacement surgery takes place. However, no medical expert offered an opinion as to when the anticipated surgery might be necessary. Without such evidence, I can only conclude that Claimant's current condition will continue indefinitely. Despite medical opinions that surgery will probably be necessary some day, the evidence demonstrates that Claimant's right-knee condition is of a long-lasting and indefinite duration. Thus, I find that it is permanent. Watson, supra.

The anticipation of probable future surgery at an indefinite time where the surgery is not yet necessary does not dissuade me from finding that Claimant has reached MMI. Thus, I discount Dr. Nichols' opinion that Claimant has not reached MMI (CX 23 at 6). Instead, I rely on the opinions of Drs. Cohn and Phillips. Dr. Cohn opined that, absent future surgery, Claimant had reached MMI by November 20, 2001 (CX 15 at 2). Dr. Phillips' March 2003 opinion that it was "obvious" that Claimant's right knee was not improving supports Dr. Cohn's opinion (CX 28 at 12-13). Therefore, based on the opinions of Drs. Cohn and Phillips and the fact that the time of future surgery, though the surgery is probable, cannot be predicted, I find that Claimant reached MMI no later than November 20, 2001, and, thus, his disability became permanent as of that date.

I will next address whether Claimant is totally disabled. If Claimant is not totally disabled, then he is limited to a scheduled award for permanent partial disability. PEPCO, supra.

II. Is Claimant totally disabled?

Claimant alleges that, because of his work-related injury and accompanying injury to his right knee, he is now totally disabled. To establish entitlement to total disability benefits under the act, Claimant bears the burden of establishing a prima facie case of total disability by showing that he cannot return to his usual employment because of his work-related injury. Trans-State Dredging Co. v. Benefits Review Board (Tarner), 731 F.2d 199 (4th Cir. 1984). If Claimant meets this burden, the burden shifts to Employer to show the availability of realistic job opportunities in Claimant's geographic area, which Claimant, by virtue of his "age, background, employment history and experience, and intellectual and physical capabilities" is capable of performing and could secure if he diligently tried. Id. at 201 (quoting New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1982)). Furthermore, to determine whether a job opportunity is realistic, Employer must elicit "the precise nature, terms, and actual availability" of the position. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988) (citing Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986)). Employer must demonstrate the availability of a range of jobs, not just one. Lentz v. Cottman Co., 852 F.2d 129 (4th

Cir. 1988). However, a single job offer can establish the availability of alternative employment. Shiver v. U.S. Marine Corps, Marine Base Exch., 23 BRBS 246, 252 (1990) (extending the holding in Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986) that one single job offer within the employer's facility can satisfy the employer's burden of establishing the availability of suitable alternative employment)). If Employer establishes that suitable alternative employment exists, Claimant may nevertheless demonstrate that he is totally disabled if he proves that he reasonably and diligently sought employment but was unable to secure a job. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 542 (4th Cir. 1988).

A. Claimant's prima facie burden

At the hearing Employer's counsel stipulated that Claimant cannot return to his pre-injury employment at the shipyard (Tr. 91; JX 2 at paragraph 14). Thus, Claimant has made a prima facie case, and the burden shifts to Employer to establish that there is alternative employment which Claimant is capable of performing and could secure if he diligently tried.⁶

B. The availability of suitable alternative employment

At the hearing Employer's counsel stated that Employer relies on two jobs as evidence of suitable alternative employment: (1) a position as a stocker at the Ft. Eustis Commissary and (2) a position as an unarmed security guard for James York Security, Inc. (Tr. 68).

1. Stocker at the Ft. Eustis Commissary

Employer's evidence of suitable alternative employment includes the testimony of Susan Crigler Castle, a vocational case manager for Concentra Integrated Services. At the hearing, Castle testified that she was aware of Claimant's work restrictions issued by Dr. Phillips.⁷ In light of Claimant's restrictions, Castle looked at jobs such as

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When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury outside work, the employer is liable for the entire disability due to both injuries if the subsequent injury is the natural or unavoidable consequence of the original work injury. Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 457 (9th Cir. 1954) ("If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury."); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). The parties have stipulated that Claimant's right-knee injury is a compensable consequence of his work-related left-knee injury (JX 2 at paragraph 10). Thus, Employer has stipulated to liability for the right-knee injury. Cyr, supra.

⁷Castle testified that Claimant's permanent work restrictions as of January 5, 1999, were "lifting of no more than twenty pounds, no ladders, only standing for two hours without sitting

donation center attendant, Wal-Mart greeter, unarmed security, and employers such as Goodwill that hire people with disabilities (Tr. 47-8). Castle explained that Goodwill Industries fills the positions at the Ft. Eustis Commissary. She testified that Goodwill was willing to accommodate work restrictions such as those placed on Claimant. She also explained that Claimant accompanied her to the job site and interviewed for the position in August or September of 2002 (Tr. 50). Castle opined that the stocker position was appropriate for Claimant (Tr. 51). Furthermore, she explained that, on September 5, 2002, Dr. Phillips approved the position as being within Claimant's restrictions (Tr. 52). The job paid \$9.42 per hour, though employees were required to meet "production quotas" in order to receive their full hourly pay (Tr. 52). The job was part-time, approximately 20 to 30 hours per week (Tr. 52). Claimant was not offered the position at the Ft. Eustis Commissary (Tr. 73).

To satisfy its burden of persuasion, Employer is required to establish "the precise nature, terms, and actual availability" of the proposed job. Thompson, supra. As to the commissary stocker job, Employer's evidence here does not establish: (1) what the "production quotas" are, (2) whether Claimant is capable of meeting the "production quotas," (3) what result would obtain if Claimant was unable to meet the "production quotas," or (4) to what extent Claimant's pay could or would be affected by any failure to meet the "production quotas." The failure to address these questions is fatal to Employer's argument that this job is suitable. I cannot properly evaluate the suitability of the commissary stocker position without evidence from which I can evaluate Claimant's ability to meet the job requirements or evidence of Claimant's wage-earning capacity in the event that he could not meet the "production quotas."

Furthermore, despite Dr. Phillips' initial approval of the commissary stocker job, Claimant introduced evidence that Dr. Phillips adopted a contrary opinion after Claimant's counsel made him aware that the commissary stocker position would require Claimant to meet production quotas (CX 20 at 55; CX 28 at 14-15). In response to Claimant's counsel's letter (CX 20 at 54) explaining that production quotas were placed on stockers, Dr. Phillips wrote the following:

"Dear Mr. Camden, I don't think [Claimant] can meet production quotas for this job. J. L. Phillips, M.D. 11-7-02"

(Id. at 55). Dr. Phillips clarified his opinion during his post-hearing deposition, explaining to Employer's counsel that he no longer believed that Claimant was capable of performing the commissary stocker job because "there was some minimum amount of work he had to do in order to keep that job and it seemed unlikely that he could do that. If he's stocking shelves, these shelves go right down to the floor, and he would have to bend down and stoop down" (CX 28 at 14-15). Dr. Phillips' changed opinion is explained by the fact that the original job description sent to him did not contain any reference to "production quotas" (CX 20 at 41). Simply put, the job approved by Dr. Phillips on September 5, 2002 was a different job from the one for which Claimant

four hours total, no crawling, no kneeling, no squatting, occasional bending" (Tr. 47).

actually interviewed, and, thus, little weight can be assigned to Dr. Phillips' prior approval of the commissary stocker position. On the other hand, his November 7, 2002 opinion was based on a job description which included the "production quotas" for the position which Claimant interviewed. Because it was based on a more accurate description of the job, I find Dr. Phillips' November 7, 2002 opinion that Claimant would not be able to meet production quotas persuasive evidence that the commissary stocker job is not suitable. Note, however, that my finding that the Ft. Eustis Commissary stocker position has not been demonstrated to be suitable for Claimant would not change even if I did not consider Dr. Phillips' November 7, 2002 opinion.⁸

2. Unarmed Security Guard for James York Security, Inc.

The second position Employer presented as evidence of suitable alternative employment is a seasonal, part-time position as an unarmed security guard for James York Security (Tr. 53). By stipulation, the parties agreed that Claimant was offered this position May 9, 2003, at a pay rate of \$5.57 per hour (JX 2). The parties also stipulated that the job offer does not specify any particular number of hours per week (JX 2).

Without the benefit of a post-hearing brief from Employer, I am left to speculate as to why, in light of the aforementioned stipulations, Employer considers this job offer sufficient evidence to meet its burden of establishing the "the precise nature, terms, and actual availability," see Thompson, supra, of realistic job opportunities in Claimant's geographic area, which Claimant, by virtue of his "age, background, employment history and experience, and intellectual and physical capabilities" is capable of performing and could secure if he diligently tried." Turner, supra. I surmise that Employer relies on this job because: (1) it was approved by Dr. Phillips and (2) it was actually offered to Claimant. I assume that Employer would argue that this single offer is sufficient evidence of suitable alternative employment under Shiver, supra.

Employer's reliance on this job as evidence of suitable alternative employment is misplaced. An actual offer of employment does not relieve Employer of its burden of establishing that the offered job is suitable. The evidence submitted with regard to this position does not satisfy that burden. Assuming that Dr. Phillips' opinion that the job is suitable answered the medical question of whether the job is suitable, there is no basis

⁸In addition to establishing that a prospective job is suitable, Employer must also establish that the job is available. Thompson, supra. The evidence presented in this case suggests that perhaps the commissary stocker job was not available because the potential employer rejected Claimant. Castle testified that Claimant was not offered the position (Tr. 73) and a letter from Candie L. Davis, the contract manager, confirmed that he was rejected by the potential employer because he did not show sufficient interest in the job (EX 3 (a)). However, because Employer has not established that the job is suitable, I need not and do not decide whether Claimant's alleged lack of enthusiasm (which is hardly surprising) for this part time night shift job for which he would have had to travel more than 50 miles round trip affects the analysis of availability or whether it simply goes to the issue of diligence under Tann, supra.

in the record from which I could accurately determine Claimant's wage-earning capacity. Employer has established an hourly wage for the position (JX 2), and the evidence demonstrates that the position is a part time seasonal job (Tr. 57, 58). However, Employer has neither established how many hours per week would be assigned nor provided evidence of how many weeks per year this seasonal position would entail. Although this position may very well be within Claimant's physical restrictions, I am unable, based on this record, to determine Claimant's residual wage-earning capacity. Thus, because the evidentiary record is so incomplete, I cannot find that this job is suitable.

For the reasons stated above, I find that Employer has not presented evidence sufficient to support a finding that either the commissary stocker job or the unarmed security guard job is suitable, and, thus, Employer has failed to rebut Claimant's prima facie showing that he is totally disabled. Therefore, I find that Claimant is permanently and totally disabled as of November 20, 2001, and his claim for benefits is not limited to a scheduled award for permanent partial disability under PEPCO, supra.

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary total disability compensation at the rate of \$323.32 per week for the period from February 15, 1990 to November 20, 2001;⁹
2. Employer shall pay Claimant permanent total disability compensation at the rate of \$323.32 per week for the period November 20, 2001 to the present and continuing;
3. Employer is entitled to a credit for all periods of disability compensation previously paid to Claimant, as set out in Stipulations 8 and 9 (JX 2); and
4. Within thirty (30) days of receipt of this decision and order, Claimant's counsel shall file a fully supported and fully itemized fee petition, serving a

⁹The parties have stipulated that the right knee injury is a compensable consequence of the February 15, 1990 work-related left knee injury (JX 2 at paragraph 10). Because the right-knee injury and work-related left-knee injury fused into one compensable injury, Cyr, supra, I find that the date of injury for the right knee is February 15, 1990, the date of injury for the left knee. Claimant reached MMI on November 20, 2001, and, thus, his disability became permanent as of that date. See Discussion section I, supra.

copy thereof on Employer's counsel, who shall then have ten (10) days to respond thereto.

A

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/msn
Newport News, Virginia